THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL No. 79 OF 2001

(ARISING CIVIL SUIT No. G.K. 68 OF 1994 MENGO)

HAJI HASSAN SENTAMU:::::::::::::::::::::::::::::::::::::: APPELLANT

- VERSUS -

TWAHA LUYOMBYA AND OTHERS :::::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

This is an appeal against the decision of his Worship Mwebembezi Julius, Magistrate Grade I at Mengo, dated 7th December 2001, in which he dismissed the appellant's suit. The appellant with four others had filed civil suit against Mwalimu Twaha Luyombya as first defendant and Sheikh Kasim as second defendant for damages for defamation, false imprisonment and assault.

The facts which gave rise to the cause of action were that on or about the 10th June 1992 the plaintiffs received a letter written by the first defendant alleging that he plaintiffs were creating a misunderstanding at Natete Town Mosque and copied to the second defendant, the Officer-in-Charge Natete Police Post, the Secretary Natete Town Mosque and the Chairman Natete Town Mosque. In that letter the first defendant wrongfully and with malice alleged that the plaintiffs were bad people who had caused a great misunderstanding among the Moslem community at Natete Town Mosque. On 28th June 1992 at 1.30p.m. when the plaintiffs went for prayers at the mosque infront of the many worshippers who had gathered, the second defendant with great fury shouted at the plaintiffs to leave the mosque and never to pray there anymore. On leaving the mosque, the plaintiffs were arrested by the police and escorted to Natete Police Post at the instigation of the defendants who accused them of unknown offences. The plaintiffs were detained at the police post but were released on police bond to report the next day at 8.30a.m. After reporting they were escorted to Katwe Police Station where the Officer-in-Charge eventually released them after advising them not to fight anymore in the mosque, a thing which the plaintiffs denied ever engaging in.

On 29th June 1992 when the first plaintiff went to pray at the mosque at 7.20p.m. the second defendant again sent him away and actually pushed him off, vowing that he would be the Sheikh there and that the plaintiff would never pray there again.
The defendants denied the above allegations contending that the disagreement between the parties were based on religious principles which had caused strained relationship between the two sides.

After the commencement of hearing of the case the second, third and fifth plaintiffs never testified in court in proof of their respective cases. Only first and fourth plaintiffs testified before court. The fourth plaintiff and first defendant died soon after their testimonies. The court ruled that the plaintiff who had not testified had lost interest in their case and as for the dead defendant; the court ruled that the first plaintiff's cause of action did not survive the first defendant.

At the end of the trial the learned Magistrate Grade I dismissed the plaintiffs' claim with costs on the ground that it was not proved on the balance of probabilities. Hence this appeal which was based on two grounds namely:

1) The learned Magistrate failed to carry out a proper evaluation of the evidence thus resulting into drawing wrong inferences and occasioning a miscarriage of justice.
2) The learned Magistrate erred in law and fact when despite clear evidence of the plaintiffs proceeded to dismiss the plaintiffs' claims against the second defendant.

Nsubuga Mubiru appeared for the appellant/plaintiff while Yasin Nyanzi appeared for the respondent/defendant. Both counsel filed written submissions in support of their respective positions.

Before I discuss the merits of appeal I would like to correct one error which is apparent on the record of proceedings. The record shows that second, third and fifth plaintiff never testified in court and the trial magistrate ruled that because they had not testified in court they had lost

interest in the case and proceeded as if their cases had been dismissed on the reason that they had abandoned their rights. With due respect, I do not agree with the learned trial magistrate. In the first place there is no law which obliges a plaintiff to testify personally in proof of his case. What is required of the plaintiff is that there must be cogent evidence to prove his case on the balance of probabilities. So a plaintiff(s) can rest a case with or without personal testimonies. In the instant case the plaintiffs rested their case with the testimonies of only two out three plaintiffs. That was proper. As a matter of fact when the plaintiffs closed their case with the testimonies of only two plaintiffs, the learned counsel for defence prayed that the case of other three plaintiffs who did not testify be dismissed. M/S Tibulya a Magistrate Grade I (as she then was) overruled the application arguing that since it was a joint claim evidence adduced was to be considered at the judgment stage. With due respect to the learned magistrate, that was the position of the law.

I now turn to the merit of the appeal.

It is clear from the grounds of appeal that this appeal raises the issue that the learned trial magistrate did not subject the evidence on record to adequate scrutiny. In **Trevor Price and Another Vs Raymond Kelsall [1957] EA 752** the Defunct Court of Appeal for Eastern Africa observed inter alia that where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial court before expressing a view it is open to an appellate court to find that the view of the trial court is ill founded and where wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself.
On the first ground it was argued that the learned trial magistrate had failed to consider the evidence adduced by the first plaintiff as recorded on page 6 line 9-11 of the proceedings where he stated as follows:-

> "….. I went to pray, Sheikh Kisitu came and pushed me and I fell on other people who were praying. He told me to go out. I went out on the verandah and tried to pray from there but he came and pushed me from there. I went home. He used force as he was annoyed. I fell on people who also pushed me. I got hurt ……."

The surviving defendant denied ever pushing the plaintiff. He called DW2 Mpiima who testified that the defendant never pushed the plaintiff. The learned trial magistrate found that the allegation of assault had not been proved on the balance of probabilities. From the evidence on record I find it difficult to fault the learned trial magistrate. This incident was said to have taken place in a mosque where there were very many worshipers. There should have been many eyewitnesses to the occasion. However none of them was brought to testify in court. Instead the plaintiff produced a witness PW4 who never witnessed the occasion.
That witness testified that it was the plaintiff who had told him that the defendants had assaulted him. That was therefore hearsay evidence which has no evidentiary value. In the absence of an independent evidence the learned trial magistrate was right to conclude that the plaintiff had failed to prove this case on the balance of probabilities.

In regard to the second ground of appeal there was no evidence implicating DW1 Sheikh Kasim. The letter which the plaintiff produced in court as a basis for their arrest by the police was written by Mwalim Twaha Luyombya D1 who is now deceased. It was not written by Sheikh Kisitu D2. According to Sheikh Kisitu DW1 and Mpiima DW2 the root cause of this dispute was because there was a religious conflict in their mosque between the traditional Moslems and the tablique Moslems. The two had fundamental differences in their religious practices. The tabliques decided that their leader should wear half kanzus. Secondly they did not want Moslems to pray for the deceased nor hold congregation to celebrate the birth of Mohamed. They also advocated having long beards. The traditional Moslems on the other hand did not approve of the above practices. The two sects started quarreling and there was a general confusion in the mosque. As that was going on a police constable who was passing by got wind of the confusion. At that time there was a violent wave of tablique movement in Kampala, a remarkable one being the violence at Old Kampala Mosque. The police appeared to have been put on alert to pre-empt such violence. That was how police went to the scene to arrest the situation. The trial magistrate analyzed the above evidence and ruled that the arrest of the plaintiffs was not authored by the present defendant (Mr Kisitu), but by Twaha Luyombya. Even then the said Twaha did the same in good faith to avoid impending violence. The learned trial magistrate was also alive to the fact that the police intervention was in public interest to prevent crime. He observed as follows:

> "Irrespective of whoever summoned the police, I think this was a great service to the plaintiffs themselves, the Moslem community and the rest of the public given the fact that there was a violent wave of tablique movement that had resulted in capture of various mosques and the remarkable violence at Old Kampala Mosque".

With the above analysis I find that the trial magistrate was right to find that there was no proof of false imprisonment and that the words complained of were not defamatory of the plaintiffs.
In conclusion I find that the learned trial magistrate had subjected the evidence on record to adequate scrutiny before concluding that the plaintiffs had failed to prove the case on the balance of probabilities. Therefore the appeal has no merit. It is accordingly dismissed with costs.

RUBBY AWERI OPIO
JUDGE

5/10/2004.
5/10/2004:-
Yasin Nyanzi present for respondent.
M/S Nsege Judy for appellant.
Both parties present.
Judgment read in chambers as in open court.

RUBBY AWERI OPIO
JUDGE
5/10/2004.